**Before the**
**Federal Communications Commission**
**Washington, D.C.**

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| In the Matter of<br>Spectrum Policy Task Force Comments | ) | ET Docket No. 02-135 |

**COMMENTS OF WINSTAR COMMUNICATIONS, LLC**

On behalf of Winstar Communications, LLC [1] (hereinafter "Winstar") enclosed herewith please find its comments regarding the November 2002 reports of the Spectrum Policy Task Force and its Working Groups.[2]

## I. INTRODUCTION

In the Public Notice the Commission notes that "[t]he Commission hereby seeks comment on the Spectrum Policy Task Force Report."[3]

Winstar's comments address particularly Part 101-Fixed Microwave Services, Subpart B-Applications and Licenses, Section 101.17-Performance requirements for the 38.6-40.0 GHz frequency band. Winstar recommends that Section 101.17 be modified to remove directly contradictory regulations governing fixed wireless license management and buildout requirements. Such contradictory rules require modification, pursuant to the goals of this proceeding.

[1] Most of the assets of Winstar Communications, Inc. ("Old Winstar") were purchased out of Chapter 11 bankruptcy on December 19, 2001 by a wholly-owned subsidiary of IDT Corp. ("New Winstar"), and New Winstar became involved in company operations pursuant to a contiguously created management agreement that was adopted by the bankruptcy court. The FCC granted the related assignment of the Old Winstar spectrum licenses in a series of actions on April 17, 2002. Some of those assignments were conditioned. Most of those license assignments were consummated June 14, 2002 except for the assignment of certain LMDS licenses, which remains to be concluded, subject to the performance of certain conditions.

[2] *See* Commission Seeks Public Comment on Spectrum Policy Task Force Report, *Public Notice*, (FCC 02-322) (Nov. 25, 2002).

[3] *See id.*

Winstar supports certain aspects of the comments filed by the Wireless Communications Association International, Inc. ("WCA"). Additionally, Winstar believes there should be greater coordination between the domestic spectrum policy makers and those representing the United States in the international arena.

## II. COMMENTS

### A. The Federal Communication Commission's Substantial Service Requirements

Winstar provides terrestrial-based, predominately fixed, broadband communications using the area-wide licensed 38.6-40.0 GHz ("39 GHz") and Local Multipoint Distribution Service ("LMDS" or "28 GHz and 31 GHz") bands. The Winstar area-wide licenses cover the entire country, Alaska, Hawaii and the lower 48 states. Winstar also utilizes the point-to-point licensed microwave bands (including, but not limited to, 6 GHz, 10 GHz, 18 GHz and 23 GHz).

According to the Federal Communications Commission's ("FCC" or "Commission") rules and precedent, the requirements to satisfy the "substantial service" standard exceed those necessary to qualify for license renewal. However, the Commission appears to turn the "substantial service" standard into the basis for license renewal for licensees in the 38.6-40.0 GHz band. Yet, in other contexts, the standard is defined as service that is substantially above a level of mediocre service, which might just minimally warrant renewal. The Commission has incorporated the term "substantial service" into the renewal process for 39 GHz licensees in a manner that differs from its original intended use. The application of this "more than minimally required for renewal" standard as the minimum standard for renewal of an uncontested license is irrational and indefensible as a matter of due process and administrative law.[4]

[4] *See* Trinity Broadcasting of Florida v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000) ("[W]e have repeatedly held that 'in the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it -- an agency may not deprive a party of property by imposing civil or criminal liability.' We thus ask

The term "substantial service" has its origins in the broadcast industry. It was the determinative factor for licensees' renewal expectancy, which served as a major preference and was the most important consideration in a comparative hearing. In 1992, the Commission adopted rules establishing renewal expectancies for cellular licensees. The rules provided that at the end of the license term, if a competing application was filed, an otherwise qualified cellular licensee would be granted a renewal expectancy if it could show that it was providing substantial service -- defined as service which is sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.[5] If the licensee could not make a substantial service showing, the merits of its application would be compared with those of challengers in a comparative hearing. Even if a licensee was not providing substantial service, it could retain its license if it was judged comparatively superior. Thus, the term "substantial service" was used to determine whether a licensee should be awarded a renewal expectancy, not whether renewal was warranted.

In adopting the 39 GHz rules in 1997, the Commission, for the first time, explicitly combined the performance standards required at buildout with the requirements for a renewal expectancy into one showing of substantial service at the time of license renewal.[6] The

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whether 'by reviewing the regulations and other public statements by the agency, a regulated party acting in good faith *would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.*'") (quoting General Elec. Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (emphasis added); *see also* Satellite Broadcasting Co. v. FCC, 824 F.2d 1 (D.C. Cir. 1987) (finding that the Commission is not permitted to rely upon "baffling and inconsistent" rules to dismiss license applications).

[5] The Commission initially required that cellular radio licensees show that they had made "substantial use" of their spectrum to receive a renewal expectancy. *In re* Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, 7 FCC Rcd. 719, para. 9 (1992). However, on reconsideration, the Commission determined that the "substantial service" standard, derived from case law in the broadcast area, would be more easily understood. *In re* Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd. 2834, paras. 8-9 (1993).

[6] *In re* Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd. 18600, para. 47 (1997) (hereinafter "39 GHz

Commission determined that specific construction requirements were not appropriate for fixed, geographically licensed wireless services, and adopted the substantial service standard to impose the least regulatory burden and allow licensees to tailor their showing to reflect the services they offer.[7] Notwithstanding this very positive conclusion, the Commission provided substantial service safe harbor examples based upon the construction of a fixed number of links per million population in each license area -- an example that could undermine the flexibility the Commission sought to promote if strictly adhered. In addition, the Commission concluded that failure to show substantial service would result in automatic licensee termination.[8] This effectively converted a renewal expectancy into an absolute renewal requirement.

Because the 39 GHz rules do not provide a relevant definition of "substantial service," licensees are entitled to refer to prior FCC interpretations of that term in similar contexts.[9] Substantial service, by its very definition in other FCC rules, requires something "substantially above" the showing that would minimally justify renewal. It is this "substantially above" concept that makes it proper for determining whether a licensee gets a renewal expectancy (creating a preference in favor of the licensee against challengers). However, pursuant to the current 39 GHz rules, licensees must prove that they are providing service that is "substantially

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Order"). The Commission subsequently adopted rules for other Part 101 wireless services that similarly conflated the construction requirements, renewal expectancy and minimum renewal standard. *See In re* Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545, para. 270 (1997) (hereinafter "LMDS"); *In re* Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd. 16934, para. 38 (2000) (hereinafter "24 GHz Band"). However, the Part 101 service-specific rules do not apply these concepts uniformly, although the LMDS and 24 GHz rules were based upon the 39 GHz rules.

[7] Notably, the Commission recognized that "[t]he build-out requirements which applied to other fixed, microwave services licensed on a link-by-link basis . . . did not appear appropriate for a fixed, geographically licensed service like 39 GHz." 39 GHz Order para. 40.

[8] 47 C.F.R. § 101.17(b) (1999) ("Any 38.6-40.0 GHz band licensee adjudged not to be providing substantial service will not have their license renewed.").

above" that which would "minimally justify renewal" in order to qualify for renewal. This standard is confusing and inconsistent with the flexibility intended by the 39 GHz Order.

Another aspect of the renewal process for 39 GHz licensees which is confusing and inconsistent with the flexibility intended by the 39 GHz Order is the current rule requiring licensees to demonstrate on per-channel, per-license basis that substantial service is being provided.[10] Many of the costs incurred by companies to build out network are common costs; that is, they are costs that will benefit all the areas of the network. The common costs include designing and engineering the network, constructing operations support systems, building databases to provide technical support to the network and customers, obtaining wireline capacity to interconnect wireless service areas, entering into equipment contracts, attaining building access rights, marketing, and general administrative functions. As the Commission is well aware, these costs cannot be rationally allocated to one particular license or another. Rather, they are costs incurred to build out all the licenses held by a licensee.

**B. In Support of the Wireless Communications Association International, Inc.**

Winstar provides terrestrial-based, predominately fixed, broadband communications using the area-wide licensed 38.6-40.0 GHz ("39 GHz") and Local Multipoint Distribution Service ("LMDS" or "28 GHz and 31 GHz") bands. The Winstar area-wide licenses cover the entire country, Alaska, Hawaii and the lower 48 states. Winstar also utilizes the point-to-point licensed microwave bands (including, but not limited to, 6 GHz, 10 GHz, 18 GHz and 23 GHz).

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[9] *See* Trinity Broadcasting of Florida v. FCC, 211 F.3d at 629 (D.C. Cir. 2000) ("[W]here . . . the agency failed to provide a relevant definition for the key regulatory term . . . the applicant is entitled to rely on the agency's prior interpretation of a nearly identical regulation.").

[10] 47 C.F.R. § 101.17(a). Interestingly, it is only in the final rule that the per-channel substantial service showing requirement appeared. The 39 GHz NPRM did not propose applying substantial service on a per-channel basis, and the 39 GHz Order is silent as to applying substantial service on a per-channel basis. Moreover, the Commission's rules do not impose a per-channel-showing requirement on other Part 101 licensee, such as LMDS licensees. *See id. at* § 101.1011 (2000).

Winstar supports certain aspects of the comments filed by the Wireless Communications Association International, Inc. ("WCA"). Winstar specifically supports the WCA comments regarding secondary markets and flexible use, the elimination of regulatory uncertainty, its concern regarding substantial use requirements, its caution over inordinately relying upon using interference temperature as a measure requiring high quality receivers, the creation of a viable band plan from the 36.0 – 51.4 GHz band ("V-Band") and the elimination of harmful interference from existing or potential satellite operations sharing the 38.6 – 40.0 GHz portion of that spectrum.

### C. Greater Coordination is needed between those who Develop Domestic Spectrum Policy and those who Negotiate on the United States' Behalf in the International Arena

Winstar notes that it currently invests significant time and resources in the International Telecommunications Union Radiocommunications policy ("ITU-R") creation process. Based on the company's intimate knowledge of the processes related to the international development and coordination of spectrum policy, Winstar continues to believe that the Commission needs additional engineering and negotiating resources to adequately participate in the ITU process. In particular, Winstar believes that those members of the Commission that make domestic policy and those United States participants that negotiate on the country's behalf in the international arena should continue working to achieve better coordination of their efforts. This includes providing the necessary FCC teams with additional engineers and negotiators to more fully engage both industry and foreign regulatory counterparts. This coordination would be in pursuit of the goal of one, unified United States position in front of the international arena.

## III. CONCLUSION

Notwithstanding the requirement that licensees demonstrate substantial service on a per-license, per-channel basis, the Commission has stated that it will give 39 GHz licensees a "significant degree of flexibility" in meeting the service requirement.[11] In order to make good on this promise, the Commission must consider the common costs incurred by licensees such as Winstar to build a regional or national network in evaluating whether substantial service has been provided. The Commission should take into account all common costs that licensees incur in building national or regional networks when considering whether a licensee has met its substantial service requirement. This approach is consistent with the flexibility intended by the 39 GHz Order, and it will provide certainty to these licensees that their common investments will be considered -- as they should be -- by the Commission.[12] As a result, Part 101 licensees will continue to make region-wide and nationwide network investments with the assurance that those investments will be counted toward the development of their licenses.

Modification of Section 101.17 to closely track Section 101.1011-Construction requirements and criteria for renewal expectancy for the LMDS service would remove the directly contradictory regulations governing fixed wireless license management and buildout requirements.

Winstar supports those aspects of the WCA's comments noted in Section B above. In addition, Winstar believes that greater coordination is needed between those who develop

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[11] 39 GHz Order para. 42. The Commission also provided quantitative safeguards for licensees to use in meeting the substantial service test. While these safeguards are useful for some licensees, they should not prevent the Commission from relying on other demonstrative factors, such as those outlined above, in determining whether a licensee is providing substantial service.

[12] *See* Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 FED. COMM. L.J. 87, 111 (1997) ("If spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum.").

domestic spectrum policy and those who negotiate on the United States' behalf in the international arena.

WHEREFORE THE PREMISES CONSIDERED, Winstar Communications, LLC requests that the Commission proceed expeditiously in its consideration of these proposals, and giving due consideration to the comments and recommendation made by Winstar in our Comments, as above.

Respectfully submitted,

**WINSTAR COMMUNICATIONS, LLC**

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